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# In the Supreme Court of the United States

OCTOBER TERM, 1996

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CITY OF BOERNE, TEXAS,

*Petitioner,*

*v.*

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

*Respondent.*

and

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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VON G. KEETCH
ALEXANDER DUSHKU
*Kirton & McConkie*
*1800 Eagle Gate Tower*
*60 East South Temple*
*Salt Lake City, Utah 84111*
*(801) 328-3600*

FREDERICK MARK GEDICKS
*1338 East 660 North*
*Orem, Utah 84097*
*(801) 224-9389*

W. COLE DURHAM, JR.
JAMES A. SERRITELLA
JAMES C. GEOLY*
KEVIN R. GUSTAFSON
STEFFEN N. JOHNSON
*Mayer, Brown & Platt*
*190 S. La Salle Street*
*Chicago, Illinois 60603*
*(312) 782-0600*

**Counsel of Record*

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## QUESTION PRESENTED

In light of free exercise problems faced by minority religions, does the Religious Freedom Restoration Act represent a legitimate exercise of Congress' power to enforce rights guaranteed by the Fourteenth Amendment through remedial legislation?

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## BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS*

### INTEREST OF THE AMICUS CURIAE

The Church of Jesus Christ of Latter-day Saints (often referred to as the "LDS Church" or "Mormon Church") is a Christian denomination with over 9,000,000 members worldwide. Slightly less than half the members of the Church reside in the United States. Because of continuing rapid growth, the Church has an active program for constructing temples, chapels, and various other structures that further the Church's religious mission. For this reason, the Church constantly encounters the kinds of land use issues at stake in the present case. While most government officials work with the Church in good faith, the pressures of hostility toward religion do sometimes operate behind the facade of ostensibly neutral land use regulations. In the aftermath of this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Religious Freedom Restoration Act ("RFRA") plays a vital role in assuring that land use regulations are administered in a manner that is consistent with genuine respect for religious freedom.

With the constitutionality of RFRA at stake, however, the Church's interest in the present case goes well beyond these important land use questions to the very core of its religious beliefs. The Church's 11th Article of Faith declares, "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." This tenet springs from an even deeper belief in the sanctity of conscience and the free agency of human beings. Like the framers of the federal

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* The parties have stipulated to their consent to the filing of this brief. The consent of the Intervenor the United States of America has been lodged with the Clerk.

Constitution, the LDS Church proclaims that the right to free exercise of religion is an inalienable right not dependent for its existence on the action of any secular sovereign—whether state or federal, domestic or foreign. In the words of James Madison, the free exercise right is inalienable because it reflects "a duty towards the Creator," which "is precedent both in order of time and degree of obligation, to the claims of Civil Society." James Madison, *Memorial and Remonstrance Against Religious Assessments*, Paragraph 1 (1785), *reprinted in Appendix* to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947). The Church believes, as has been argued in other briefs, that the Constitution affords Congress adequate power to enact RFRA, and that RFRA is vital to protecting our inalienable first freedom from state and federal encroachments.

When the scope of First Amendment free exercise protections was narrowed by *Smith*, the Church felt profoundly threatened by the array of potential encroachments on religious freedom that this decision opened up, and accordingly joined the broad coalition of churches and other organizations that supported passage of RFRA in 1993 ("the Coalition"). We continue to support and actively participate in the ongoing efforts of the Coalition to defend RFRA against its detractors. Since the Church continues to support the efforts of the Coalition, including its brief in this case, there is no need for us to repeat the main arguments made there confirming that RFRA does not establish religion, that it does not violate separation of powers or federalism principles, and that Section 5 of the Fourteenth Amendment grants Congress sufficient power to enact RFRA. Rather, our aim is to emphasize the vital significance of RFRA for minority religious traditions such as ours, and to highlight the historical and contemporary considerations that warrant the Congressional remedy it provides. As Elder Dallin H. Oaks of the Quorum of the Twelve Apostles of the Church stated at the time of the Congressional hearings on RFRA,

the LDS Church is "looking to the larger good and using the experience of our faith in history as a motivation to lend our voice to the protection of smaller groups against future incursion on their freedom."[1]

## SUMMARY OF ARGUMENT

The historical experience of the Church of Jesus Christ of Latter-day Saints underscores the importance of providing the kinds of protection for religious liberty that RFRA affords. Although the LDS Church is now the seventh largest denomination in the United States,[2] its experience outside of Utah has always been that of a minority religion. Some of the darkest pages of the history of religious persecution in America chronicle the treatment of Mormons, as they were driven in the nineteenth century from Ohio to Missouri to Illinois and finally to the valleys of the Rocky Mountains. While the Church believes "in obeying, honoring, and sustaining the law,"[3] it is also deeply conscious that laws and the officials who apply them sometimes operate in ways that violate religious freedom. Many of the landmarks of persecution in LDS history were carried out under the cloak of "neutral" and "general" laws. Not surprisingly, then, the Church has long believed that just government has a compelling interest in safeguarding religious freedom and making certain that when state encroachments on that value are permitted, they must be justified on the basis of "interests of the highest order and those not otherwise served." *Wisconsin*

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[1] *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 before the Subcomm. on Civil and Constitutional Rights of the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 57 (1992).

[2] 1996 Yearbook of American and Canadian Churches, *quoted in* Salt Lake Trib., May 25, 1996.

[3] Church of Jesus Christ of Latter-day Saints, *Pearl of Great Price*, Article of Faith 12, at 61 (1981).

*v. Yoder*, 406 U.S. 205, 215 (1972). The Church's experience over the past 175 years has confirmed that the legitimate free exercise rights of a religious minority cannot be adequately protected or enforced without the functional equivalent of the compelling state interest/least restrictive alternative test that crystallized in this Court's free exercise jurisprudence in the decades before the decision of *Employment Division v. Smith*.

The historical religious persecution evidenced by LDS history is reemerging today, albeit in subtler forms that do not generally display the brutality of the past. Churches and individual believers face an ever-proliferating range of practical problems in the aftermath of *Smith*. Ranging from questions dealing with abortion and the beginning of life to questions of treatment of the dead, and touching on virtually every aspect of religious life in between, these practical problems have made the protections afforded by RFRA all the more significant.

One reason RFRA is so important is that there are structural biases in the modern regulatory state that systematically undervalue religious freedom rights. In fact, the comprehensive study of zoning cases collected in the Appendix shows that religious minorities have suffered disproportionately disadvantageous treatment as a result of these structural biases at the initial decision stage. Congress has authority to pass legislation to remedy the resulting systematic under-protection of free exercise values.

## ARGUMENT

### I. THE HISTORICAL EXPERIENCE OF THE MORMON CHURCH UNDERSCORES THE NEED FOR RFRA.

> We believe that rulers, states, and governments have a right, and are bound to enact laws for the protection of all citizens in the free exercise of their religious belief * * *.
>
> -*Doctrine & Covenants* 134:7 (1981).

Much of the early history of the Mormon Church is a litany of persecution. Our aim here is not to bemoan this extensive history, but to identify a number of salient episodes that have forged the Church's conviction that RFRA's protections are vital to genuine protection of religious freedom. These episodes help document some of the many ways in which facially neutral laws were used and abused in the course of what was unquestionably one of the worst religious persecutions in U.S. history.

#### A. The Persecutions of Mormons in Missouri in the Late 1830's Exemplify Violations of Religious Rights that the Fourteenth Amendment was Designed to Remedy.

##### 1. The Absence of Federal Remedies Meant That No Relief Was Available for the Persecutions of Mormons in Missouri.

In November, 1839, and again in February, 1840, Mormon leaders met with President Martin Van Buren to seek relief for persecutions that church members had suffered in Missouri. JAMES B. ALLEN & GLEN M. LEONARD, THE STORY OF THE LATTER-DAY SAINTS 144 (1976). After being pillaged, massacred, and deprived of their property, in many cases as a direct result of state action, the Mormons were ultimately forced out of Missouri under threat of an order signed by Missouri's governor directing that "[t]he Mormons

must be treated as enemies and must be *exterminated* or driven from the state." *Id.* at 127 (emphasis added); see *id.* at 81-93, 104-110, 120-130; LEONARD J. ARRINGTON & DAVIS BITTON, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 44-45 (1979); STEPHEN C. LESUEUR, THE 1838 MORMON WAR IN MISSOURI (1987). Church leaders turned to the President when all state-level efforts to find redress had been exhausted. His response was terse: "Gentleman, your cause is just, but I can do nothing for you."[4] The Fourteenth Amendment and RFRA, which enforces its mandate, was designed at least in part to fill this constitutional gap.

As a matter of constitutional law at the time, President Van Buren's statement was probably accurate. After all, the Supreme Court had held just a few years earlier that the Bill of Rights was not applicable to the states and operated only as a constraint on federal power. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Thus, neither the Free Exercise Clause nor the Takings Clause provided any basis for relief. This remained true a few years later, when persecutions culminated in the murder of Joseph Smith in 1844 by discharged state militiamen and the expulsion of Church members from Illinois under brutal winter conditions in 1845-46. ALLEN & LEONARD, *supra*, at 193-197, 220-233. Never again should such religious persecution be left without legal remedy.

**2. The Fourteenth Amendment Was Designed in Part to Remedy Antebellum Incursions on the Free Exercise of Religious Minorities.**

The same constitutional gap that barred relief to the early Mormons contributed contemporaneously to massive infringements of the religious liberty of slaves and religiously

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[4] JOSEPH SMITH, HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 4:80, 5:393 (1949).

motivated abolitionists in the antebellum South. What is too often forgotten in reviewing the history of the Fourteenth Amendment is that its framers were concerned not only with guaranteeing the secular civil rights of the former slaves, but also with dismantling a variety of legal abuses that encroached on the free exercise rights of both the former slaves and those who opposed the institution of slavery.[5] Many of these abuses took the form of neutral, general laws, but their impact on free exercise was severe. Louisiana went so far as to make it a crime, punishable by death, to "write, print, publish or distribute" abolitionist literature, most of which was written out of religious conviction.[6] Black religious assemblies were heavily regulated, and curfew laws, while more neutral in tenor, drastically curtailed the possibility of black religious gatherings at night.[7] Generally applicable laws prohibiting slaves from being taught to read prevented slaves from reading the Bible.[8]

By the time the Fourteenth Amendment was framed, the fact that Mormons had been denied federal relief for intense persecution was largely forgotten, but anti-slavery forces were acutely aware that the absence of federal relief had

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[5] See Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1131-37 (1994).

[6] See Digest of the Laws Relative to Slaves and People of Free Colour in the State of Louisiana (1835), *reprinted in* 2 STATUTES ON SLAVERY: THE PAMPHLET LITERATURE 47, 68 (Paul Finkelman ed. 1988). The law targeted "any thing having a tendency to produce discontent among the free coloured population of the State, or insubordination among the slaves therein," and violations were punishable by death or imprisonment.

[7] See Lash, *supra* note 5, at 1134-35 & nn.133-36 (collecting sources).

[8] *Id.* at 1135 & nn. 137-38 (collecting sources).

resulted in massive infractions of religious freedom in the antebellum South. For this reason, the free exercise of religion was clearly understood to be one of the "privileges and immunities of citizens of the United States" protected by Section 1 of the Fourteenth Amendment,[9] and, accordingly, Section 5 was understood as granting Congress power to remedy encroachments on religious freedom that had grown up in the absence of a federal remedy. The fight against slavery and against all the collateral structures that evolved to defend that institution sensitized the framers of the Fourteenth Amendment to the need for federal remedies capable of subjecting the facade of neutral, general laws woven by an entrenched majority to searching scrutiny when religious and other fundamental rights are at stake. The restructuring of American federalism that emerged from the cauldron of the Civil War was not accidental, and the new protection of the "privileges and immunities of citizens" was intended to fill a gap that had allowed endless suffering to minority religious groups.

### B. The Use and Abuse of Ostensibly Neutral and General Laws Resulted in Serious Incursions on Religious Freedom in Territorial Utah.

From the 1850's until shortly before Utah achieved statehood in 1896, the federal government engaged in a

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[9] Senator Jacob Howard, commenting on the content of the "privileges and immunities" clause, indicated that it included "the personal rights guaranteed and secured by the first eight amendments to the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1865). In the Forty-Second Congress, Henry L. Dawes stated that the "privileges and immunities" clause "secured the free exercise of * * * religious belief." CONG. GLOBE, 42d Cong., 1st Sess. 475 (1871). See also Lash, *supra* note 5, at 1146-49 & nn. 181-95 (collecting sources confirming that Fourteenth Amendment framers believed the "privileges and immunities" clause embraced free exercise of religion).

protracted and steadily intensifying conflict with the LDS Church that nearly ended in the Church's destruction.[10] In addition to directly outlawing the practice of certain fundamental doctrines of the Church,[11] the federal government passed a series of facially neutral laws that operated to increase federal pressure on the Church. For example, statutes were passed that effectively deprived Mormons of jury trial rights. See, *e.g.*, *Clawson v. United States*, 114 U.S. 477 (1885). In 1887, the Edmunds-Tucker Act had the effect of dismantling inheritance laws, overriding spousal immunity, and restricting the right to vote. 24 Stat. 635 (1887). In many areas, what began as neutral legislation was notched progressively tighter as persecution progressed. For example, in 1870, Utah's territorial legislature granted women the right to vote. But in 1887, the Edmunds-Tucker Act provided that "it shall not be lawful for any female to vote at any election hereafter held in the Territory." 24 Stat. 639, § 20. As the persecution reached a crescendo, territorial legislation was passed barring Mormons (regardless of sex) from voting and holding public office. Mere adherence to the Mormon faith was deemed sufficient to sustain disenfranchisement. See *Davis v. Beason*, 133 U.S. 333 (1890).

Not satisfied with these provisions, Congress passed more blatantly targeted provisions. At the height of the conflict in 1887, Congress took the outrageous and unprece-

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[10] See, *e.g.*, EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830-1900, at 125-260 (1988).

[11] The question of plural marriage, of course, was addressed in *Reynolds v. United States*, 98 U.S. 145 (1878). The practice of plural marriage was abandoned by the Church in 1890, and in filing this *amicus* brief the Church has no interest in revisiting this issue.

dented step of eliminating the Church's legal existence by revoking its corporate charter and authorizing federal receivers to assume ownership of virtually all of the Church's property and other assets, including its most sacred houses of worship, temples in Logan, Manti, St. George, and Salt Lake City. See *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

As the Mormon experience demonstrates, a creative legislative body has little difficulty in fashioning facially neutral laws or administrative devices capable of imposing substantial burdens on a religious community. Congress may reasonably determine that the only effective way to ferret out illegitimate use of this potential is to subject state action that imposes substantial burdens on religion to searching scrutiny. That is what RFRA does.

## II. WITHOUT RFRA, THE TYPES OF OVERT AND COVERT HOSTILITY TOWARD MINORITY RELIGIOUS FAITHS THAT HAVE AFFLICTED MORMONS ARE DESTINED TO IMPOSE IMPERMISSIBLE BURDENS ON A WIDE ARRAY OF RELIGIOUS PRACTICES.

Under *Smith*, "neutral" laws of "general applicability" are entitled to no special scrutiny under the Free Exercise Clause. 494 U.S. at 882. As long as legislation and/or administrative regulations are not specifically aimed at (or are not overtly hostile to) religion and apply across a relatively wide range of non-religious conduct, *Smith* assumes that religious liberty either will not be unduly trammeled or will be accommodated by exemptions crafted during the lawmaking process. *Id.* at 890. This logic is open to question. "There is nothing talismanic about neutral laws of general applicability * * * for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Id.* at 901 (O'Connor, J., concurring in the judgment).

History, in fact, demonstrates that "neutral" and "general" laws are often inimical to religious liberty. "Facially neutral laws of general application — the kind that raise no constitutional issue after *Smith* — were central to some of this country's worst religious persecutions. Both the polygamy law that underlay much of the Mormon persecution, and the flag salute law invoked against Jehovah's Witnesses, were facially neutral, generally applicable laws."[12] Moreover, "[i]f past is prologue, the forces of local, State, and Federal governmental power, now freed from the compelling governmental interest test [by *Smith*], will increasingly interfere with the free exercise of religion."[13] "The reason, quite simply, is that few laws that in fact inhibit the free exercise of religion are specifically aimed at religious practices." Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73, 86-87.

A sampling of contemporary post-*Smith* cases demonstrates that "neutral" laws of "general applicability" now dramatically intrude upon virtually every aspect of religious life. As a result of "neutral" and "general" laws, a Catholic hospital has been denied accreditation based on its refusal to instruct its residents on the performance of abortions notwithstanding strong religious objections to the taking of unborn life,[14] a religious mission for the homeless operated by

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[12] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 213 (1994) (footnote omitted).

[13] *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. at 24 (1992) (statement of Elder Dallin H. Oaks, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-day Saints).

[14] *Id.* at 157 (statement of Edward Gaffney, Dean and Profes-

Mother Teresa has been shut down because it was located on the second floor of a building without an elevator,[15] and children have been prevented from volunteering to care for their elderly parents housed in government regulated nursing homes.[16] Individuals in government custody have been denied access to religious paraphernalia without any inquiry into whether accommodation of the individual's sincere religious beliefs would impose any significant official burden at all.[17]

In fact, the potential incursion of facially "neutral" and "generally applicable" laws upon religious belief and practice is breathtaking. As noted in the Senate Report accompanying the passage of RFRA, the *Smith* standard places "all religious activity * * * at risk." *Religious Freedom Restoration Act of 1990: Hearings before the Subcomm. on Civil and Constitu-*

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sor of Law, Valparaiso University School of Law (citing *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990)); see *id.* ("Even on a belief so deeply and widely held as conscientious objection to the performance of an abortion, State officials ignored the [Supreme] Court's suggestion that it is desirable for the political branch to provide free exercise exemptions. And the courts, after *Smith*, thought it perilous to provide a remedy.").

[15] *Id.* at 149.

[16] In *Greater New York Health Care Facilities v. Axelrod*, 770 F. Supp. 183, 187 (S.D.N.Y. 1991), the district court summarily rejected challenges to health regulations that limited the service of volunteers in nursing homes despite the fact that, for some of the volunteers, the services represented their fulfillment of the Fifth Commandment obligation to honor one's father and mother.

[17] In *Friend v. Kolodzieczak*, 923 F.2d 126, 128 n.1 (9th Cir. 1991), the court upheld a prison regulation forbidding inmates from possessing rosaries and scapulars in their cells. The court in fact went so far as to assert that the denial did not even implicate a constitutional right.

*tional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 23 (1990) (statement of Rep. Lamar Smith).[18] Even the long-established priest/penitent privilege is eroding.[19] Loyalty oaths may once again be imposed on government employees notwithstanding sincere religious objection.[20] And "neutral" and "generally applicable" laws might well force churches to hire homosexuals despite

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[18] Accord *Religious Freedom Restoration Act: Hearings before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 44 (1992) (statement of Rev. Oliver S. Thomas, Baptist Joint Committee on Public Affairs and the American Jewish Committee) ("Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. * * * In time, every religion in America will suffer."); *Religious Freedom Restoration Act of 1990: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 39-40 (1990) (statement of Rev. Robert P. Dugan, Jr., Director, Office of Public Affairs, National Association of Evangelicals) ("Must a Catholic church get permission from a landmarks commission before it can relocate its altar? Can orthodox Jewish basketball players be excluded from interscholastic competition because their religious belief requires them to wear yarmulkes? Are certain evangelical denominations going to be forced to ordain female ministers, or the Catholic church to ordain female priests? * * * Are school children, contrary to their religious beliefs, to be forced to salute the flag?").

[19] See, *e.g.*, *Mockaitis v. Harcleroad*, 938 F. Supp. 1516 (D. Or. 1996) (court refuses to destroy secret tape-recording by police of priest/penitent conversation); *Hutchison v. Luddy*, 414 Pa. Super. 138, 606 A.2d 905 (1992) (allowing discovery of church's sensitive confidential files even though the records were compiled and archived pursuant to canon law).

[20] See *Bessard v. California Community Colleges*, 867 F. Supp. 1454 (E.D. Cal. 1994).

contrary (and deeply held) religious beliefs.[21]

Of course, not every post-*Smith* intrusion upon religious belief and practice is likely to provoke a collective cry of alarm. Some religious liberties infringed by "neutral" and "generally applicable" laws (such as the right of Old Order Amish to refuse to display a fluorescent orange triangle on a horse-drawn buggy[22] or of Sikhs to decline to wear a motorcycle helmet because of a religious obligation to wear a turban[23]) seem rather prosaic in a pervasively secular society. The Free Exercise Clause exists, however, precisely because even prosaic violations of conscience are deeply felt. "The Constitution is to protect unpopular ideas, not popular ideas."[24] And many "neutral," "generally applicable" assaults upon religious practice are significant indeed.

For example, in *You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990), the district court held that an unnecessary autopsy on a young Hmong man did not constitute a violation of the Free Exercise Clause, despite the religiously-based belief of his family that the autopsy condemned the spirit of the deceased. *Id.* at 560. The court had originally ruled in

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[21] See, *e.g.*, *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. 762 (Cal. Super. Ct. 1980) (church escaped liability for firing a homosexual only because the court applied the pre-*Smith* "compelling interest" test).

[22] See *Minnesota v. Hershberger*, 444 N.W.2d 282 (Minn. 1989), *vacated and remanded*, 495 U.S. 901 (1990), *upheld on state law grounds*, 462 N.W.2d 393 (Minn. 1990).

[23] See *Buhl v. Hannigan*, 20 Cal. Rptr. 2d 740 (Ct. App. 1993).

[24] See *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) (Statement of Rep. Washington).

favor of the Yangs, but — following *Smith* — felt compelled to reverse its earlier ruling. The court nevertheless expressed its deep regret in applying the neutral, generally applicable autopsy law to the facts of the case:

> My regret stems from the fact that I have the deepest sympathy for the Yangs. I was moved by their tearful outburst in the courtroom during the hearing on damages. I have seldom, in twenty-four years on the bench, seen such a sincere instance of emotion displayed. I could not help but also notice the reaction of the large number of Hmongs who had gathered to witness the hearing. Their silent tears shed in the still courtroom as they heard the Yangs' testimony provided stark support for the depth of the Yangs' grief.

*Id.* at 558.[25]

Following *Smith*, government at all levels is busily dictating the outcome of deeply felt religious issues. State and local governments dramatically limit the use of property held for religious purposes.[26] States and municipalities require landlords to engage in rental practices that the

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[25] See also *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991) (compelling autopsy despite contrary, deeply felt conservative Jewish beliefs).

[26] See, *e.g.*, *Rectors, Wardens & Members of Vestry of Saint Bartholomew's Church v. City of New York*, 914 F.2d 348, 354-55 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (rejecting Free Exercise challenge to zoning law that excluded churches from commercial zones while permitting secular not-for-profit organizations to locate in such areas but remanding for equal protection clause claim).

landlords sincerely believe to be sinful.[27] Still other "neutral" laws have transformed religious societies from havens and sanctuaries into government enforcement agencies.[28]

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[27] See generally James C. Geoly & Kevin R. Gustafson, *Religious Liberty and Fair Housing: Must a Landlord Rent Against His Conscience?*, 29 J. MARSHALL L. REV. 455 (1996). In *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 278-80 (Alaska), *cert. denied*, 115 S. Ct. 460 (1994), for example, a landlord's refusal to rent to an unmarried couple violated state fair housing law and could not be excused on the ground that the landlord sincerely believed that his rental of the apartment would facilitate fornication and, therefore, be sinful). But *cf. Swanner v. Anchorage Equal Rights Comm'n*, 115 S. Ct. 460, 461-462 (1994) (Thomas, J., dissenting) (asserting that the Alaska Supreme Court improperly raised the value of fair housing over the fundamental right to free exercise of religious belief). See also *Smith v. Fair Employment & Housing Comm'n*, 51 Cal. Rptr. 2d 700, 709, 719 (Cal. 1996), *cert. pending*, No. 96-31 (July 8, 1996) (religious landlord could not discriminate against unmarried couples regardless of the religious beliefs of the landlord). Other state courts have protected religious landlords under state constitutional provisions. See, *e.g., Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (religiously motivated landlord exempted from fair housing laws regarding marital status on the basis of state religious liberty provisions); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (same).

[28] See, *e.g., United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends*, 753 F. Supp. 1300 (E.D. Pa. 1990) (compelling the Society of Friends, commonly known as "the Quakers," to enforce an IRS levy against two employee-members who conscientiously refused to pay the military portion of their federal taxes despite the Friends' assertion that the IRS could not compel the Society to violate the religious beliefs of members by acting as an enforcement arm of the government). The oddity of the result in this case, however, did not go unnoticed by the district court. In ruling for the IRS, the court apologetically wrote:

The current legal regime, in fact, threatens not only the sacred beliefs of church members, but the financial stability of organized religion itself. Increasing numbers of bankruptcy trustees and private creditors are attempting to use federal bankruptcy and state fraudulent conveyance laws to recover ordinary course contributions made to churches by their members, even absent any badges of fraud.[29] Coerced recovery of honestly donated tithing monies and other contributions constitutes a gross abridgement of religious liberty. The practice of tithing is deeply rooted in the religious traditions of this nation and is essential for salvation in many religions — including the LDS faith. First mentioned in the Pentateuch, see *Leviticus* 27:30-32, tithing is more than a temporal rule of financial support for churches. It is a spiritual obligation to God, with associated blessings for the faithful and punishments for the disobedient.

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> It is ironic that here in Pennsylvania, the woods to which Penn led the * * * Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so.

*Id.* at 1306. See also *American Friends Serv. Comm. Corp. v. Thornburgh*, 961 F.2d 1405 (9th Cir. 1990) (although Quaker beliefs require adherents to provide employment even to illegal immigrants, the sanctions established by the Immigration Reform and Control Act can be applied to a Quaker charitable organization).

[29] See, *e.g.*, *Christians v. Crystal Evangelical Free Church*, 82 F.3d 1407 (8th Cir. 1996), *cert. pending*, No. 96-437; *Morris v. Midway So. Baptist Church (In re Newman)*, 1996 WL 711319 (D. Kan., Nov. 26, 1996); *Fitzgerald v. Magic Valley Evangelical Free Church, Inc. (In re Hodge)*, 200 B.R. 884 (Bankr. D. Idaho 1996); *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995).

> For I am the Lord * * *. Yet ye have robbed me. But ye say, Wherein have we robbed thee? In tithes and offerings. Ye are cursed with a curse: for ye have robbed me * * *. Bring ye all the tithes into the storehouse that there may be meat in mine house, and prove me now herewith, saith the Lord of hosts, if I will not open you the windows of heaven, and pour you out a blessing, that there shall not be room enough to receive it. And I will rebuke the devourer for your sakes * * *.

*Malachi* 3:6, 8-11. As a result, the use of government resources to confiscate an honestly given tithe is a substantial disruption of an individual's religious exercise.

Tithing recovery imposes substantial burdens, not only upon believers, but on churches. Without legal protection, it will become a checklist item in every individual bankruptcy to demand return of any contributions to religious organizations, and churches will become the most common source of partial payment in consumer bankruptcies. This liability will impose heavy (perhaps crushing) financial burdens on churches, especially those with limited resources. Time and again churches will be compelled to defend large and small contributions alike against private creditors and bankruptcy trustees, the widow's mite going to pay lawyers instead of feeding the poor and constructing houses of worship. Churches will be forced to repay long-spent contributions from years past, disrupting budgets and programs, and occasionally to suffer the sale of religious property on the courthouse steps.

The foregoing discussion amply demonstrates that "[t]he connection between religious persecution and formal neutrality interpretations of the Free Exercise Clause is not merely theoretical. It is historical."[30] And what is at stake is

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[30] Douglas Laycock, *The Remnants of Free Exercise*, 1990

substantial. As spokespeople for the American Civil Liberties Union testified before Congress:

> At risk [are] such familiar practices as the sacramental use of wine, kosher slaughter, the sanctity of the confessional, religious preferences in church hiring, establishing places of worship in areas zoned for other use, permitting religious sponsored hospitals to decline to provide abortion or contraception services, sex segregation during worship services, exemptions from mandatory retirement laws, a church's refusal to ordain women or homosexuals, exemptions from landmark and zoning regulations, and the inapplicability of highly intrusive educational rules to parochial schools. These [are] decisions in areas that society ha[s] previously assumed that religious groups had the right to make for themselves and could not be compelled to change just because society thought otherwise.

*Religious Freedom Restoration Act: Hearings before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 192 (1992) (statement of Nadine Strossen, President, and Robert S. Peck, Legislative Counsel, American Civil Liberties Union).

The history of the Mormon persecutions vividly illustrates that "neutral" and "general" laws do not adequately protect the values underlying the Free Exercise Clause, and the contemporary instances of abuse sketched above — from "general" laws regulating abortion (note 14, *supra*) to the "neutral" provisions of the Bankruptcy Code (note 29, *supra*) — demonstrate that the lessons from that history have not been entirely learned. "Although many private interests are sacrificed as a price of living in a civilized society, the free exercise of religion cannot be one

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SUP. CT. REV. 1, 64.

of them. Free exercise has at least as great a claim to the protection of heightened scrutiny as any other right afforded such protection [under the Constitution]." Lee, *supra*, 1993 B.Y.U. L. REV. at 95.

## III. IN ENACTING RFRA, CONGRESS PROPERLY COMPENSATED FOR STRUCTURAL BIASES THAT IMPEDE THE EXERCISE OF RELIGIOUS LIBERTY.

History's lesson regarding the importance of heightened scrutiny for free exercise of religion is particularly evident in the present case. According to Petitioner, St. Peter Church in Boerne embodies "times and memories [that] are graven into the souls of a city," and "this highly visible church set on a hill speaks directly of the history of this City and its people." Pet. Br. 2. The City's memory is quite selective. Indeed, there is a perverse irony in its claim: the church is located where it is, on a hill near the edge of town, only because the City refused to allow churches within the city limits when the parish was founded. KENDALL COUNTY HISTORICAL COMM'N, A HISTORY OF KENDALL COUNTY TEXAS 22 (1984); Gregory Curtis, *The Church on the Hill*, TEXAS MONTHLY 9 (Dec. 1996). The City no doubt intended to recall something other than the history of religious persecution with its description of the cultural value of the church. But, by denying the church the right to expand, the City imposes substantial burdens on both the rights of believers who are forced to worship in inadequate alternative facilities and the rights of the church itself to determine how it should best fulfill its religious responsibilities to its parishioners. In doing so, the City exhibits a subtle contemporary version of its earlier exclusionary practices: active religious life is disparaged, marginalized, and cast outside the limits of the secularist city, which treasures religious museums but fails to comprehend the needs of living religion. Without RFRA, what may in fact be graven into the soul of the City is a secularist insensitivity

that exalts historical preservation of a past contribution of religious life (the church building) over preserving the religious rights of today's living Catholic community.

### A. Congress Has Authority to Remedy Violations of Religious Liberty Stemming From a Growing Secularist Bias that Distorts Governmental Neutrality.

The tension between religious and secularist outlooks in this case is an instance of a much broader phenomenon that James Davison Hunter has aptly described as "culture war." JAMES DAVISON HUNTER, CULTURE WARS (1991). Older patterns of tension along sectarian lines have been supplanted by a broad polarization cutting across all major areas of culture that divides traditional religious believers from those with more secularist orientations. *Id.*; W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions,* 1993 B.Y.U. L. REV. 421, 434-37. Whereas formerly, secular interests could fairly be said to be neutral as between different religious traditions, there are a growing number of areas in which secularist objectives are anything but neutral from a religious perspective. Religious considerations are thereby undervalued in secular bureaucracies because of the tendency of secular bureaucrats to confuse secularity with neutrality. If the two were identical, any interest with a secular agenda would be empowered by *Smith* to trump religious rights. The secularity of the agenda clearly does not insure its neutrality toward religious groups and beliefs at the other pole of the "culture war."

The culture wars have produced organized interest groups who are affirmatively hostile to religion in general, or to certain religions in particular. For examples of contemporary anti-Catholicism, see Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 440-442 (1994); Edward McGlynn Gaffney, Jr.,

*Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 279-293 (1992); for a book-length anti-Baptist hate tract, see ARTHUR FREDERICK IDE, EVANGELICAL TERRORISM: CENSORSHIP, FALWELL, ROBERTSON & THE SEAMY SIDE OF CHRISTIAN FUNDAMENTALISM (1986); for an account of organized hostility to religious "cults," see ANSON SHUPE & DAVID BROMLEY, THE NEW VIGILANTES (1980); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 64-65. For examination of the theoretical underpinnings of hostility to religion, see Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992); Michael W. McConnell, *"God is Dead and We Have Killed Him": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163. Public opinion polls, cited in the brief of Respondent Flores, show widespread hostility to "fundamentalists" and "members of minority religious sects or cults." Resp. Br. 30.

It is generally impossible to know, let alone prove to judicial satisfaction, when this religious hostility has contributed to legislation, or when it has caused legislators or bureaucrats to refuse a religious exemption in circumstances where they would have granted an exemption to a well-connected secular interest group. But these things happen, and they happen frequently. RFRA merely requires the *government* to justify the resultant burdens on religion instead of making the *burdened claimant* prove discrimination.

### B. Congress May Legitimately Act to Correct the Encroachments on Religious Liberty Emanating From the Structure of Modern Bureaucratic Government.

Our world has been accurately described as one in which "regulation is everywhere." STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 144 (1993). Federal and state laws govern most of American life, usually through broad delegations of interpretive, enforcement, and regulatory authority

to administrative and local government agencies. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-517.

The nature of modern administrative bureaucracy makes it nearly inevitable that government will impose substantial burdens on religious practice—especially minority religious practice—in the pursuit of relatively unimportant government goals. In the first place, a variety of factors drive administrative agencies to seek to expand their jurisdiction. Too often, efforts in this regard carry regulatory bureaucrats into domains that should in fact be protected spheres of religious autonomy. Moreover, agencies understandably seek to maximize the consistency of their rules and regulations. Exceptions to rules and regulations are unattractive from the perspective of efficiency and administrative convenience, and, if granted too liberally, may result in the agency's having to defend its very existence. Furthermore, government officials who are unfamiliar with distinctive religious needs may think there is no rational basis for differential treatment. Thus, the nature of administrative bureaucracy influences administrators to exercise discretion against accommodating the religious practices of those burdened by agency action.

The threat to religious liberty posed by agency bias against exemptions is heightened by the general absence and/or ineffectiveness of judicial review of agency decisions. Judicial review of agency decisions, particularly those by state agencies and local governments entities, is sometimes not available at all. See, *e.g.*, DANIEL R. MANDELKER, LAND USE LAW § 8.11, at 326 (2d ed. 1988) (noting that most state zoning acts do not provide for judicial review of decisions by planning commissions and other local government entities that administer zoning ordinances). Grants of statutory authority to agencies are typically broad and general, giving such agencies tremendous discretion in making decisions about how to implement their statutory

purpose. It is also well established that, even when judicial review of agency decisions exists, courts owe substantial deference to discretionary decisions made by administrative agencies within their areas of expertise. *E.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-845, 865-866 (1984); *Blum v. Bacon*, 457 U.S. 132, 141 (1982); Scalia, *supra*, 1989 DUKE L.J. at 516-517. In sum, by their nature, agencies are unlikely to grant exemptions to those who are religiously burdened, and these refusals are effectively unreviewable under a deferential standard of judicial scrutiny.

The very case before the Court illustrates the lack of protection afforded the free exercise of religion in such circumstances. Boerne's historic preservation ordinance created a commission charged with drafting and administering an historic preservation plan, to include "Historic Districts," and vested with broad discretion to "protect, enhance and perpetuate selected historic landmarks," "safeguard the City's historic and cultural heritage," "stabilize property values," "foster civic pride" in the past, "protect and enhance the City's attractions to tourists," "strengthen the economy," and promote the use of protected landmarks and sites "for the culture, prosperity, education and general welfare" of the City's residents and visitors. Pet. Br. 2-3; Pet. App. 2a. It was this commission that denied church authorities permission to expand the Church, on the ground that expansion was inconsistent with the "spirit and purpose" of the preservation ordinance. Jt. App. 38, 68-69 ¶ v.

Without RFRA, the sheer breadth of the commission's mandate doomed the Church's interests from the beginning. Among other things, the definition of the City's "historic and cultural heritage," the designation of landmarks and districts that reflect this heritage, and judgments about property values, civic pride, tourism and the like, are discretionary decisions made under a general grant of authority. Although the commission identified criteria authorized by the ordinance

in reaching its decision to disallow Church expansion, Jt. App. 38, 67 ¶ l, this was hardly critical to the validity of that decision; the ordinance is so broadly worded that it is difficult to imagine any decision that would be inconsistent with its "spirit and purposes."

Moreover, a superficial analysis of the ordinance could easily lead a court to conclude that heightened scrutiny is not required. After all, there is nothing on the face of the ordinance to suggest that it is directed at a particular religion or at religion generally. Moreover, even though only a small part of the City is regulated under the ordinance, courts have found similar landmark laws to be neutral and generally applicable. See, *e.g.*, *Rectors, Wardens & Members of Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 353-356 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Thus, without RFRA, the question of whether the commission's decisions impermissibly intrude on valid religious freedom rights would be virtually immune from judicial review. *Cf. City of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinances to be upheld unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"). Even though the Church is merely a twentieth-century imitation of Spanish mission architecture, Pet. Br. 2, Resp. Br. 1; even though only the facade of the Church originally rested within an Historic District, Jt. App. 68 ¶ s, 70 ¶ gg; and even though the proposed expansion of the church would have left this facade intact, Jt. App. 7 ¶ 12, the merits of the commission's determination that expansion would nonetheless destroy a portion of the City's historic and cultural heritage are effectively unreviewable. Far more important than any of this, however, is the unreviewability of the commission's implicit determination that preservation of the Church building as a relic of the past is more important than permitting Church members to worship in the present.

Our current age of pervasive bureaucracy, in which government rules and regulations administered according to the discretion of administrative agencies control virtually every area of American life, demands additional protection for religious practice if the full measure of religious liberty guaranteed by the First Amendment is to be realized. Land use provisions in particular characteristically involve permit schemes analogous to those struck down in *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940), which grant local officials essentially standardless discretion to determine whether religious practices may go forward. Constitutional rights to the free exercise of religion are of little practical value if they permit control of the meeting place of a church to pass from its members to government outsiders without any examination of the government's asserted need for such control. Yet, unless the goals of regulatory agencies like the City's historic preservation commission are tested against more searching scrutiny than neutrality and general applicability, agency officials have no occasion and no motivation to consider the value of pursuing their regulatory goals relative to the substantial burdens this pursuit may impose on the free exercise of religion. As this Court noted in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)), "The Free Exercise Clause protects against governmental hostility which is masked as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.'" RFRA simply provides the occasion and the motivation to scrutinize such gerrymanders, by requiring that regulators identify a genuinely important government goal that cannot be achieved without burdening religious practice in some less restrictive manner.

### C. RFRA Compensates for Inherent Limits on Legislative Capacity to Craft Religiously Sensitive Exemptions.

In *Smith*, this Court acknowledged the possibility that religious practice exemptions could appropriately be crafted within the political process. 494 U.S. at 890. In fact, such accommodations are found at countless points throughout the laws and regulations of the nation. They reflect the general respect of lawmakers for the principles of religious freedom that make our pluralistic society possible. Frequently, however, lawmakers fail to make appropriate exemptions not because they necessarily wish to decline granting the exemption, but because no legislative body can be aware of the full range of religious needs warranting exemptions. See, *e.g.*, *Axelrod*, *supra* note 16 (failing to exempt religiously motivated volunteer services from a regulatory limit on non-compensated services); *Bessard*, *supra* note 20 (requiring a loyalty oath not withstanding religious beliefs proscribing execution of such a pledge); *Hershberger*, *supra* note 22 (requiring vehicular signals that intrude upon religious beliefs even though state's interest could be furthered by means that do not require violation of conscience); *Buhl*, *supra* note 23 (motorcycle helmet law fails to accommodate religious beliefs that preclude wearing a helmet). Alternatively, even when exemptions are granted, they may be insufficiently broad. See, *e.g.*, note 15, *supra* (failing to exempt religious shelter for the homeless from a housing regulation designed to facilitate access by the handicapped); *Montgomery*, *supra* note 25 (general autopsy laws require procedures that condemn the spirit of the deceased); note 27 *supra* (fair housing laws fail to accommodate practices that landlords sincerely believe to be sinful); note 28 *supra* (government enforcement scheme compels church to violate the conscientious beliefs of its members). However, even where well-intentioned lawmakers attempt to craft appropriate exemptions, their efforts often fail to achieve the accommodation

they intend, because of the complexity and diversity of religious beliefs themselves. See, *e.g.*, note 14 (failing to make sufficiently broad exemptions for conscientious objection to abortion). Even a lawmaker with the best of intentions may not be able to craft an exemption sufficiently refined to address the legitimate needs of all religious groups. The remedial influence of RFRA is vital in such settings to prevent religious groups from being forced into wooden pigeonholes created by insufficiently sensitive exemption schemes.

### D. Congress May Legitimately Reallocate Burdens of Justification When Proof of Constitutional Violations Is Difficult to Obtain.

In the absence of RFRA, a claimant whose religious practice is burdened by law can obtain relief only by carrying the heavy burden of proving that there is an unconstitutional motivation behind a law, and thus that it is not genuinely neutral or general. See *Lukumi*, 508 U.S. at 524, 533, 537-538, 543-545. The difficulties in doing so are considerable. Assuming that government decisionmakers intend the reasonably foreseeable consequences of their lawmaking actions, judges can of course make responsible judgments about the purpose of a law based on its language and effect. *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). Once the inquiry ventures past these external indications of purpose to the subjective intentions of members of the lawmaking body, however, reliable conclusions about government motivations are nearly impossible to reach. See *id.* at 636 (Scalia, J., dissenting); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). Although statements of intention by individual decisionmakers can sometimes be found in legislative histories, such histories are not always compiled, particularly in cases involving state legislation or discretionary administrative action, and are in any event subject to manipulation. See *Edwards*, 482 U.S. at 638 (Scalia, J., dissenting). Even when they exist, statements of individual

decisionmakers, while highly probative of the intentions of those who make them, are only circumstantial evidence of the motivation of the decisionmaking body as a whole. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Finally, courts are understandably reluctant to find unconstitutional motivations because of the implicit insult such a finding directs at members of the decisionmaking body. See, *e.g.*, *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1093 (1969). This is especially true when, as is almost always the case, direct evidence of unconstitutional motivations is lacking. *Cf. O'Brien*, 391 U.S. at 384 (observing that "the stakes are sufficiently high for us to eschew guesswork" in determining whether government action was unconstitutionally motivated).

The virtual impossibility of adducing strong evidence of illicit motivation, combined with the reticence of judges to find such motivation on anything but the strongest evidentiary record, suggest that deserving religious claimants will frequently be unable to show the impermissible motivation behind facially neutral and general laws, even in situations in which the government decisionmaking body in fact intended to restrict the claimants' religious practice or consciously valued secular interests over the claimants' religious ones. RFRA's compelling interest standard does nothing more than compensate for the structural bias associated with the difficulty of proving motivation: it simply reallocates from the religious practitioner to the government the burden of proof with respect to whether facially neutral and general laws are tainted by impermissible motives.

### E. Legitimate Religious Freedom Claims in the Field of Land Use Regulation Are Likely to Be Inadequately Protected Without RFRA.

The foregoing structural biases against full recognition of free exercise rights are particularly evident in land use decisions. In preparing this brief, an effort was made to

analyze all reported cases that have dealt with religion claims in the context of zoning cases.[31] The results are presented as the Appendix. What is striking is that, while minority religions represent considerably less than 9% of the general population, they are involved in over 49% of the cases involving the right to locate a church at a particular site, and in over 33% of the cases seeking approval of accessory uses of an existing church site (*e.g.*, for sheltering or feeding the homeless). The disproportionate burden carried by minority religions becomes even more distressing if one takes into account cases involving non-denominational groups, or groups that cannot be classified on the basis of information in case reports. If these unclassified cases are counted, over 68% of reported location cases, and over 50% of accessory use cases, involve minority religions.

If the experience of the LDS Church is any indicator, the foregoing statistics significantly underreport the number of problems that minority churches face. The vague standards of land use law leave room for anti-minority biases to have effect. Congress could legitimately address these problems in passing RFRA.

## CONCLUSION

For all of the foregoing reasons, together with those advanced by the Coalition and Respondent Flores, the decision of the Court of Appeals should be affirmed.

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[31] The study includes cases cited in the relevant A.L.R. annotations, a leading treatise, and the relevant Westlaw keynote classification. The methodology used to select the cases is described in more detail in the Appendix.

Respectfully submitted.

VON G. KEETCH
ALEXANDER DUSHKU
*Kirton & McConkie*
*1800 Eagle Gate Tower*
*60 East South Temple*
*Salt Lake City, Utah 84111*
*(801) 328-3600*

FREDERICK MARK GEDICKS
*1338 East 660 North*
*Orem, Utah 84097*
*(801) 224-9389*

W. COLE DURHAM, JR.
JAMES A. SERRITELLA
JAMES C. GEOLY*
KEVIN R. GUSTAFSON
STEFFEN N. JOHNSON
*Mayer, Brown & Platt*
*190 S. La Salle Street*
*Chicago, Illinois 60603*
*(312) 782-0600*

**Counsel of Record*

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# APPENDIX

# APPENDIX

## DISCRIMINATION AGAINST MINORITY CHURCHES IN ZONING CASES

In order to gain some perspective on the treatment of non-mainline groups in zoning cases, a broad sample of zoning decisions challenged on free exercise grounds has been analyzed. A total of 196 cases was ultimately included in the study. This set of cases should include a fairly comprehensive set of reported cases in this field. It includes all cases cited in annotations that have collected cases on this topic (including cases cited in pocket part updates),[1] all cases cited in the section of a leading treatise on zoning that addresses issues of religious land uses,[2] and all cases identified through a Westlaw search classified under West's Constitutional Law Key Number 84.5(18), which collects religion cases involving zoning and land use. It is conceivable that some cases involving religion-based constitutional challenges to zoning decisions may not have been captured through these sources, but it is unlikely that there are many such cases.

The cases thus collected have been classified by the type of zoning case and by the denomination involved. Essentially, the zoning issues fall into two broad categories: cases that involve zoning of property to permit a church building to be erected on a particular site ("location cases"), and cases that determine whether an accessory use (such as

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[1] Jay M. Zitter, Annotation, *What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance*, 11 A.L.R.4th 1084 (1992); Jeffrey F. Ghent, Annotation, *Definition of Church or Religious Use Within Zoning Ordinances*, 62 A.L.R.3d 197 (1967); Annotation, *Zoning Regulations as Affecting Churches*, 74 A.L.R.2d 377 (1961).

[2] A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 20 (4th ed. 1992).

a homeless shelter or soup kitchen) may be allowed at the site of an existing church ("accessory use cases").

In most of the cases, the denomination involved is obvious either from the case name or from discussion of the case in the opinion. There are, however, a substantial number of cases in which either no denominational affiliation appears in the case, or the church involved is non-denominational. These cases are designated as "unclassified" in the tables below. While some of the unclassified religious associations may in fact have a denominational affiliation that simply is not evident from the cases, most of these cases appear to involve local, congregationally organized churches that are functionally similar to organizations we have classified as minority churches.

Information on the size of various denominations was derived from tables provided in BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 15-17 (1993). The data is derived from the National Survey of Religious Identification conducted by the Graduate School of the City University of New York, which surveyed a representative sample of 113,000 people across the continental United States. This is the most comprehensive poll ever conducted on the issue of religious affiliation. *Id.* at 1-2. It provides the best available data of religious affiliation as assessed from the perspective of the believer.

The line between mainline denominations and smaller groups is difficult to draw, because one is dealing with a continuum. For purposes of this study, groups with more than 1.5% of the adult population were treated as mainline groups, whereas groups with smaller percentages were included in the minority category. The only exception in the tables that follow is Judaism, but if the statistics on Judaism were divided to reflect the major branches of that tradition,

the various branches would come under the 1.5% threshold. Some smaller Protestant groups may be more analogous to mainline groups, so that the categorizations in a few cases could be questioned.

The population percentages in the tables that follow do not add up to 100% because the tables do not include data on non-religious groups and on the portion of the population (only 2.30%) that did not respond to the survey. Many smaller religions were not covered by the study because they have no reported cases, but such religions represent only 2.22% of the population.

In analyzing the data, a basic starting assumption is that any zoning dispute that progresses far enough into litigation to yield a reported decision reflects a situation in which religious groups *perceive* that their religious rights are being violated. For a variety of practical reasons, ranging from the need to have a good working relationship with local government officials to the sheer cost of litigation to the availability of alternative sites, churches probably bring fewer actions in this area than they think they may be entitled to bring. Table 1 summarizes the number of cases in the location and accessory use categories by denomination.

TABLE 1

| Zoning Cases by Denomination | | | | | |
|---|---|---|---|---|---|
| **Denomination** | **Self-Described % of Adult Population** | **# of Location Cases** | **%** | **# of Accessory Use Cases** | **%** |
| **Larger Denominations** | | | | | |
| **Catholics** | 26.20% | 16 | 12.80% | 13 | 20.00% |
| **Major Protestants (>1.5% of Adult U.S. Population)** | | | | | |
| Baptists | 19.40% | 7 | 5.60% | 7 | 10.77% |
| Episcopal | 1.70% | 4 | 3.20% | 2 | 3.08% |
| Lutheran | 5.20% | 6 | 4.80% | 3 | 4.62% |
| Methodist | 8.00% | 3 | 2.40% | 2 | 3.08% |
| Pentecostal | 1.80% | 1 | 0.80% | 0 | 0.00% |
| Presbyterian | 2.80% | 2 | 1.60% | 3 | 4.62% |
| Subtotal: | 38.90% | 23 | 18.40% | 17 | 26.15% |
| **Minority Denominations (<1.5% of U.S. Population)** | | | | | |
| Assemblies of God | 0.37% | 0 | 0.00% | 4 | 3.20% |
| Buddhist | 0.40% | 0 | 0.00% | 1 | 1.54% |
| Christian Science | 0.12% | 1 | 0.80% | 1 | 1.54% |
| Churches of Christ | 1.00% | 0 | 0.00% | 1 | 1.54% |
| Church of God | 0.30% | 3 | 2.40% | 1 | 1.54% |
| Church of LDS | 1.40% | 3 | 2.40% | 1 | 1.54% |
| Eastern Orthodox | 0.28% | 1 | 0.80% | 1 | 1.54% |
| Evangelical | 0.14% | 2 | 1.60% | 0 | 0.00% |
| Hare Krishna | 0.30% | 1 | 0.80% | 0 | 0.00% |
| Islam | 0.50% | 2 | 1.60% | 0 | 0.00% |
| Jehovah's Witness | 0.80% | 19 | 15.20% | 1 | 1.54% |
| Judaism | 2.20% | 25 | 20.00% | 11 | 16.92% |
| Quakers | 0.04% | 1 | 0.80% | 0 | 0.00% |
| Seventh Day Adventists | 0.38% | 1 | 0.80% | 0 | 0.00% |
| Unification Church | 0.30% | 2 | 1.60% | 1 | 1.54% |
| Unitarian | 0.30% | 1 | 0.80% | 1 | 1.54% |
| **Minority Cases** | 8.83% | 62 | 49.60% | 24 | 33.97% |
| **Unclassified** | 14.78% | 24 | 19.20% | 11 | 16.92% |
| **Minority + Unclassified** | 23.61% | 86 | 68.80% | 11 | 16.92% |
| **Total Cases** | | 125 | 100.00% | 65 | 100.00% |

The figures indicated in Table 1 already suggest that a substantial amount of the litigation in this area involves

minority religious groups. This burden is more pronounced when compared to the percentage of groups from these denominations in the general population. Table 2 provides these comparisons.

TABLE 2

| Percentages of Zoning Cases by Denominational Group and Percentage of United States Population | | | |
|---|---|---|---|
| **Denomination** | **Self-Described % of Adult Population** | **Location Cases (%)** | **Accessory Use Cases (%)** |
| **Larger Denominations** | | | |
| **Catholics** | 26.20% | 12.80% | 20.00% |
| **Major Protestants (>1.5% of Adult U.S. Population)** | | | |
| Baptists | 19.40% | 5.60% | 10.77% |
| Episcopal | 1.70% | 3.20% | 3.08% |
| Lutheran | 5.20% | 4.80% | 4.62% |
| Methodist | 8.00% | 2.40% | 3.08% |
| Pentecostal | 1.80% | 0.80% | 0.00% |
| Presbyterian | 2.80% | 1.60% | 4.62% |
| Subtotal: | 38.90% | 18.40% | 26.15% |
| **Minority Denominations (<1.5% of U.S. Population)** | | | |
| Assemblies of God | 0.37% | 0.00% | 3.20% |
| Buddist | 0.40% | 0.00% | 1.54% |
| Christian Science | 0.12% | 0.80% | 1.54% |
| Churches of Christ | 1.00% | 0.00% | 1.54% |
| Church of God | 0.30% | 2.40% | 1.54% |
| Church of LDS | 1.40% | 2.40% | 1.54% |
| Eastern Orthodox | 0.28% | 0.80% | 1.54% |
| Evangelical | 0.14% | 1.60% | 0.00% |
| Hare Krishna | 0.30% | 0.80% | 0.00% |
| Islam | 0.50% | 1.60% | 0.00% |
| Jehovah's Witness | 0.80% | 15.20% | 1.54% |
| Judaism | 2.20% | 20.00% | 16.92% |
| Quakers | 0.04% | 0.80% | 0.00% |
| Seventh Day Adventists | 0.38% | 0.80% | 0.00% |
| Unification Church | 0.30% | 1.60% | 1.54% |
| Unitarian | 0.30% | 0.80% | 1.54% |
| **Minority Cases** | 8.83% | 49.60% | 33.97% |
| **Unclassified** | 14.78% | 19.20% | 16.92% |
| **Minority + Unclassified** | 23.61% | 68.80% | 50.89% |
| **Total Cases** | | 100% | 100% |

The data in Table 2 are not wholly satisfactory, because the relative populations of various religious groups vary over the rather lengthy period from which the cases are drawn, whereas the population figures, to the extent they are available, are quite recent. Nonetheless, the figures suffice to give a rough sense for how the percentage of cases in which a given religious society is involved corresponds with that society's percentage representation in the population as a whole. These figures strongly suggest that a high percentage of cases are being contested by religious groups comprising a very small percentage of the total population.

# TABLE 3

| Zoning Cases by Denomination: Claims Granted and Denied | | | | | | |
|---|---|---|---|---|---|---|
| **Denominations** | **Claims Granted** | **% of Total Claims** | **% of Denom's Claims** | **Claims Denied** | **% of Total Claims** | **% of Denom's Claims** |
| **Larger Denominations** | | | | | | |
| **Catholics** | 19 | 10.00% | 65.52% | 10 | 5.26% | 34.48% |
| **Major Protestants (>1.5% of Adult U.S. Population)** | | | | | | |
| Baptists | 4 | 2.11% | 28.57% | 10 | 5.26% | 71.43% |
| Episcopal | 6 | 3.16% | 100.00% | 0 | 0.00% | 0.00% |
| Lutheran | 6 | 3.16% | 66.67% | 3 | 1.58% | 33.33% |
| Methodist | 4 | 2.11% | 80.00% | 1 | 0.53% | 20.00% |
| Pentecostal | 1 | 0.53% | 100.00% | 0 | 0.00% | 0.00% |
| Presbyterian | 5 | 2.63% | 100.00% | 0 | 0.00% | 0.00% |
| Subtotal: | 26 | 13.68% | 65.00% | 14 | 7.37% | 35.00% |
| **Minority Denominations (<1.5% of U.S. Population)** | | | | | | |
| Assemblies of God | 0 | 0.00% | 0.00% | 4 | 2.11% | 100.00% |
| Buddhist | 1 | 0.53% | 100.00% | 0 | 0.00% | 0.00% |
| Christian Science | 1 | 0.53% | 50.00% | 1 | 0.53% | 50.00% |
| Churches of Christ | 1 | 0.53% | 100.00% | 0 | 0.00% | 0.00% |
| Church of God | 2 | 1.05% | 50.00% | 2 | 1.05% | 50.00% |
| Church of LDS | 2 | 1.05% | 50.00% | 2 | 1.05% | 50.00% |
| Eastern Orthodox | 0 | 0.00% | 0.00% | 2 | 1.05% | 100.00% |
| Evangelical | 1 | 0.53% | 50.00% | 1 | 0.53% | 50.00% |
| Hare Krishna | 0 | 0.00% | 0.00% | 1 | 0.53% | 100.00% |
| Islam | 2 | 1.05% | 100.00% | 0 | 0.00% | 0.00% |
| Jehovah's Witness | 11 | 5.79% | 55.00% | 9 | 4.74% | 45.00% |
| Judaism | 30 | 15.79% | 83.33% | 6 | 3.16% | 16.67% |
| Quakers | 1 | 0.53% | 100.00% | 0 | 0.00% | 0.00% |
| Seventh Day Adventists | 1 | 0.53% | 100.00% | 0 | 0.00% | 0.00% |
| Unification Church | 2 | 1.05% | 66.67% | 1 | 0.53% | 33.33% |
| Unitarian | 2 | 1.05% | 100.00% | 0 | 0.00% | 0.00% |
| **Minority Cases** | 57 | 30.00% | 66.28% | 29 | 33.72% | 33.72% |
| **Unclassified** | 17 | 8.95% | 48.57% | 18 | 9.47% | 51.43% |
| **Minority + Unclassified** | 74 | 38.95% | 61.16% | 47 | 24.74% | 38.84% |
| **Total Cases** | 119 | 62.63% | 62.63% | 71 | 37.37% | 37.37% |

According to Table 3, 63% of religious claims were granted, and 37% were denied. At the judicial level, minority groups appear to fare slightly better than mainline groups: they won 57 cases, or 66% of the cases in which they were involved; majority religions prevailed in 26 cases, or 65% of the cases in which they were involved. Among other things, these figures suggest that judicial review does help remedy the problems minority groups face, and tends to be impartial across groups. Since the data do not indicate that the higher percentage of cases in which minority religions are involved reflect higher levels of ungrounded claims, Table 2's data showing that minority groups face a substantially greater level of problems in the zoning area than mainline churches seems sound.

The percentage of cases in which various denominations' religious challenges to zoning decisions have been won and lost is summarized in Table 4. The figures show the number of claims won and lost both as percentages of the total number of cases and as percentages of the total number of claims in which each denomination (or group of denominations) is involved.

# TABLE 4

| Percentages of Zoning Cases Won and Lost by Denominational Groups and Percentage of United States Population | | | |
|---|---|---|---|
| **Denomination** | **Self-Described % of Adult Population** | **Cases Won as % of Total Cases** | **Cases Lost as % of Total Cases** |
| **Larger Denominations** | | | |
| **Catholics** | 26.20% | 10.00% | 5.26% |
| **Major Protestants (>1.5% of Adult U.S. Population)** | | | |
| Baptists | 19.40% | 2.11% | 5.26% |
| Episcopal | 1.70% | 3.16% | 0.00% |
| Lutheran | 5.20% | 3.16% | 1.58% |
| Methodist | 8.00% | 2.11% | 0.53% |
| Pentecostal | 1.80% | 0.53% | 0.00% |
| Presbyterian | 2.80% | 2.63% | 0.00% |
| Subtotal: | 38.90% | 13.68% | 7.37% |
| **Minority Denominations (<1.5% of U.S. Population)** | | | |
| Assemblies of God | 0.37% | 0.00% | 2.11% |
| Buddhist | 0.40% | 0.53% | 0.00% |
| Christian Science | 0.12% | 0.53% | 0.53% |
| Churches of Christ | 1.00% | 0.53% | 0.00% |
| Church of God | 0.30% | 1.05% | 1.05% |
| Church of LDS | 1.40% | 1.05% | 1.05% |
| Eastern Orthodox | 0.28% | 0.00% | 1.05% |
| Evangelical | 0.14% | 0.53% | 0.53% |
| Hare Krishna | 0.30% | 0.00% | 0.53% |
| Islam | 0.50% | 1.05% | 0.00% |
| Jehovah's Witnesses | 0.80% | 5.79% | 4.74% |
| Judaism | 2.20% | 15.79% | 3.16% |
| Quakers | 0.04% | 0.53% | 0.00% |
| Seventh Day Adventists | 0.38% | 0.53% | 0.00% |
| Unification Church | 0.30% | 1.05% | 0.53% |
| Unitarian | 0.30% | 1.05% | 0.00% |
| **Minority Cases** | 8.83% | 30.00% | 15.26% |
| **Unclassified** | 14.78% | 8.95% | 9.47% |
| **Minority + Unclassified** | | 38.95% | 24.74% |
| **Total Cases** | | 62.63% | 37.37% |

The foregoing data suggest that a variety of factors are operating in the zoning area in the United States that lead to de facto discrimination against smaller religious groups. This confirms that behind the surface of ostensibly neutral zoning laws, a variety of discriminatory and prejudicial factors may be operational that have the effect of violating the religious rights of minority groups.

To facilitate access to the data provided in this appendix, the cases reviewed are listed below, classified as they have been categorized in the study. Within each denominational category, the citations appear alphabetically by jurisdiction (with federal cases preceding state cases) in reverse chronological order. The parentheticals following the citations indicate how the case was classified for purposes of the study. The letters in the parentheticals have the following meanings:

G = The religious organization prevailed on the religious claim asserted.
D = The religious claim asserted was denied.
L = The case was a "location" case.
A = The case was an "accessory use" case.

**Catholic:**

*Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879 (D. Md. 1996) (D) (A)

*Ellsworth v. Gercke*, 156 P.2d 242 (Ariz. 1945) (G) (L)

*Ramona Convent of Holy Names v. City of Alhambra*, 26 Cal. Rptr. 2d 140 (Ct. App. 1993) (D) (A)

*Tustin Heights Ass'n v. Board of Supervisors of County of Orange*, 339 P.2d 914 (Cal. Dist. Ct. App. 1959) (D) (L)

*St. John's Roman Catholic Church Corp. v. Town of Darien*, 184 A.2d 42 (Conn. 1959) (D) (L)

*Daughters of St. Paul v. Zoning Board*, 549 A.2d 1076 (Conn. App. Ct. 1988) (G) (A)

*Hull v. Miami Shores Village*, 435 So. 2d 868 (Fla. Dist. Ct. App. 1983) (D)(A)

*Diakonian Soc'y v. City of Chicago*, 380 N.E.2d 843 (Ill. App. Ct. 1978) (G) (L)

*Board of Zoning Appeals v. Wheaton*, 76 N.E.2d 597 (Ind. Ct. App. 1948) (G) (A)

*Society of Jesus of New England v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990) (G) (L)

*Sisters of Holy Cross of Mass. v. Town of Brookline*, 198 N.E.2d 624 (Mass. 1964) (G) (L)

*Mooney v. Village of Orchard Lake*, 53 N.W.2d 308 (Mich. 1952) (G) (L)

*City of Minneapolis v. Church Universal & Triumphant*, 339 N.W.2d 880 (Minn. 1983) (G) (L)

*Association for Educ. Dev. v. Hayward*, 533 S.W.2d 579 (Mo. 1976) (G) (A)

*Black v. Town of Montclair*, 167 A.2d 388 (N.J. 1961) (G) (A)

*Andrews v. Board of Adjustment*, 143 A.2d 262 (N.J. Super. Ct. Law Div. 1958) (G) (A)

*Diocese of Rochester v. Planning Board*, 136 N.E.2d 827 (N.Y. 1956) (G) (L)

*Diocese of Buffalo v. Buckowski*, 446 N.Y.S.2d 1015 (Sup. Ct. 1982) (D) (L)

*Province of Meribah Soc'y of Mary, Inc. v. Village of Muttontown*, 538 N.Y.S.2d 850 (App. Div. 1989) (D) (A)

*American Friends of Soc'y of St. Pius, Inc. v. Schwab*, 417 N.Y.S.2d 991 (App. Div. 1979) (G) (L)

*People v. Kalayjiam*, 352 N.Y.S.2d 115 (App. Div. 1973) (D) (L)

*Franciscan Missionaries of Mary v. Herdman*, 184 N.Y.S.2d 104 (App. Div. 1959) (G) (A)

*Hayes v. Fowler*, 473 S.E.2d 442 (N.C. Ct. App. 1996) (G) (A)

*Allen v. City of Burlington Board of Adjustment*, 397 S.E.2d 657 (N.C. Ct. App. 1990) (G) (L)

*Archdiocese v. Washington County*, 458 P.2d 682 (Or. 1969) (D) (L)

*O'Hara v. Board of Adjustment*, 131 A.2d 587 (Pa. 1957) (D) (L)

*Stark's Appeal*, 72 Pa. D. & C. 1681 (Pa. 1950) (G) (A)

*In re Appeal of Hoffman*, 444 A.2d 764 (Pa. Commw. Ct. 1982) (G) (A)

*State ex rel. Roman Catholic Bishop v. Hill*, 90 P.2d 217 (Nev. 1939) (G) (L)

**Major Protestant:**

**Baptist:**

*Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988) (D) (L)

*Messiah Baptist Church v. County of Jefferson*, 697 F. Supp. 396 (D. Colo. 1987) (D) (L)

*Ex Parte Fairhope Bd. of Adjustments*, 567 So. 2d 1353 (Ala. 1990) (D) (A)

*Corinth Baptist Church v. State Dep't of Transp.*, 656 So. 2d 868 (Ala. Civ. Ct. App. 1995) (D) (A)

*Cochise County v. Broken Arrow Baptist Church*, 778 P.2d 1302 (Ariz. Ct. App. 1989) (D) (L)

*Abram v. City of Fayetteville*, 661 S.W.2d 371 (Ark. 1983) (D) (A)

*City of Chico v. First Ave. Baptist Church*, 238 P.2d 587 (Cal. Dist. Ct. App. 1951) (D) (L)

*East Side Baptist Church of Denver v. Klein*, 487 P.2d 549 (Colo. 1971) (D) (A)

*Parkview Baptist Church v. City of Pueblo*, 336 P.2d 310 (Colo. 1959) (D) (A)

*North Syracuse First Baptist Church v. Village of N. Syracuse*, 524 N.Y.S.2d 894 (App. Div. 1988) (G) (A)

*Yocum v. Power*, 157 A.2d 368 (Pa. 1960) (G) (L)

*Antrim Faith Baptist Church v. Commonwealth*, 460 A.2d 1228 (Pa. Commw. Ct. 1983) (D) (L)

*City of Sumner v. First Baptist Church*, 639 P.2d 1358 (Wash. 1982) (G) (A)

*State ex rel. Lake Drive Baptist Church v. Bayside Bd. of Trustees*, 108 N.W.2d 288 (Wis.) (G) (L)

**Episcopal:**

*Rector, Wardens, & Members of Bestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (G) (A)

*O'Brien v. Chicago*, 105 N.E.2d 917 (Ill. App. Ct. 1952) (G) (L)

*State v. Cameron*, 498 A.2d 1217 (N.J. 1985) (G) (L)

*Greentree at Murray Hill Condominiums v. Good Shepherd Episcopalian Church*, 550 N.Y.S.2d 981 (Sup. Ct. 1989) (G) (A)

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*Moore v. Tribe*, 743 F. Supp. 201 (S.D.N.Y. 1990) (G) (A)

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*Galfas v. City of Atlanta*, 193 F.2d 931 (5th Cir. 1952) (D) (L)

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*Unitarian Universalist Church v. Shorten*, 314 N.Y.S.2d 66 (Sup. Ct. 1970) (G) (A)

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